

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Petition of the State Independent Alliance and)
the Independent Telecommunications Group)
for a Declaratory Ruling That the Basic)
Universal Service Offering Provided by)
Western Wireless in Kansas is Subject to)
Regulation as Local Exchange Service)

WT Docket No. 00-239

REPLY COMMENTS OF WESTERN WIRELESS

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EXECUTIVE SUMMARY

Western Wireless Corporation (“Western Wireless”) submits that the Commission should reject the Petition for the following reasons. First, Western Wireless’ overall cellular service is clearly mobile, and the Basic Universal Service (“BUS”) offering is simply one cellular service option. As an “ancillary” or “incidental” service, BUS thus falls squarely within the category that the Commission has already classified as commercial mobile radio service (“CMRS”). Neither the incumbent local exchange carriers (“ILECs”) who filed the petition nor their supporters who filed comments presented any facts that would refute this point.

Second, the real source of the ILECs’ and their supporters’ discontent appears to be that ILECs and CMRS providers are regulated differently. But that argument merely reflects dissatisfaction with Congress’ decision to exempt CMRS providers from state rate and entry regulation even when they compete with ILECs in providing basic local telecommunications, and it provides no basis for misclassifying BUS as non-CMRS. More fundamentally, the principle of competitive neutrality requires that the offerings of new entrants with no market power be regulated differently from the offerings of the dominant monopoly ILECs. Several decades of decisions by Congress, the Commission, and state commissions rebut arguments of the ILECs and their supporters to the contrary.

Finally, the comments of the Kansas Corporation Commission (“KCC”) make it clear that the relief sought in the Petition is unwarranted. Even if Western Wireless’ BUS offering were not classified as CMRS, the KCC shows that Western Wireless – properly – would not be subject to ILEC requirements such as those regarding data transmission speed. Moreover, the KCC has not asked the FCC to permit it to regulate Western Wireless’ rates and entry – to the contrary, it indicates that “Western Wireless’ BUS offering does not appear, at this time, to constitute ‘a substantial portion of the communications within the state.’”^{*/} There is thus no basis for the Commission to take action under Section 332(c)(3)(A), contrary to the apparent position of some of the parties.

^{*/} KCC at 4.

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REPLY COMMENTS OF WESTERN WIRELESS

Western Wireless Corporation ("Western Wireless") submits that the Commission should reject the captioned Petition. 1/ Neither the Petition nor the comments filed in support of it provide any legal basis for classifying Western Wireless' Basic Universal Service ("BUS") as anything other than commercial mobile radio service ("CMRS"). Nor do they provide persuasive public policy arguments for such treatment. To the contrary, the Communications Act of 1934, as amended ("Act") and pro-competitive public policy require that mobile wireless carriers that enter universal service markets be regulated differently from the incumbent carriers that dominate those markets.

1/ See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Western Wireless' Basic Universal Service in Kansas is Subject to Regulation as Local Exchange Service*, WT Docket No. 00-239, DA 00-2622 (rel. Nov. 21, 2000).

I. WESTERN WIRELESS' BASIC UNIVERSAL SERVICE OFFERING FALLS WITHIN THE COMMISSION'S ESTABLISHED DEFINITION OF MOBILE SERVICE

The comments of incumbent local exchange carriers ("ILECs") and their associations and supporters do little more than re-state the Petition's arguments, which, as demonstrated in our Opposition, offer no basis for denying BUS its CMRS status. Most of these parties' comments simply reformulate factual assertions leveled in the Petition – and rebutted in our Opposition – or offer factual contentions that add nothing of substance to those in the Petition. 2/

First, the ILEC representatives' comments attempt, usually citing facts provided in the Petition itself, to show that BUS is a non-mobile fixed wireless offering. 3/ However, as shown in our Opposition, neither the fact that one form of CMRS customer premises equipment ("CPE") has stationary applications or is more cumbersome than others, nor the terminology used to market it, are determinative of a service's "commercial mobile" status under the Act. 4/ Likewise, neither the

2/ See, e.g., Rural Utilities Service ("RUS"); Rural Iowa Independent Telephone Association ("RIITA"); Warinner, Gesinger & Associates, LLC ("WGA"); Fred Williamson & Associations, Inc. ("FWA").

3/ Organization for the Promotion and Advancement of Small Telecommunications Companies at 2-3 ("OPASTCO"); Nebraska Rural Independent Companies at 2-3 ("Nebraska Companies"); Minnesota Independent Coalition at 3-4 ("MIC"); South Dakota Independent Telephone Coalition at 3-5 ("SDITC"); Beacon Telecommunications Advisors, LLC at 1-3 ("Beacon"); John Staurulakis, Inc., at 4-7 ("JSI").

4/ Western Wireless at 18-20.

fact that some CPE has shorter battery life than others, 5/ nor that it allows use of peripheral devices customarily utilized in stationary applications at a home or office, 6/ makes the CPE itself any less mobile or determines CMRS status. Since its inception, the wireless industry has seen significant changes to the type of CPE used by consumers. It is likely that new CPE will continue to be used, some of which may be larger or more bulky to accommodate new applications, like Internet access. The Commission should therefore avoid declassifying a service as CMRS simply based upon the type of CPE used by consumers – such a result would stifle innovation and the availability of new service offerings.

Rather, it is the fact that a service is mobile – or ancillary or incidental to mobile service – that makes it CMRS for purposes of the federal Act. As demonstrated in Western Wireless' initial Opposition filing, BUS cannot be viewed in isolation from Western Wireless' overall cellular service (which no party refutes is CMRS). 7/ Neither the special CPE used by BUS subscribers, nor the rate structure or levels associated with BUS, distinguish it from Western Wireless' other

5/ JSI at 6; MIC at 3.

6/ MIC at 3 (noting that Telular unit can provide Internet access to BUS customers' personal computers); SDITC at 4. Similarly, that CPE can be used while being powered from a fixed electrical source – as can the Telular unit, and most conventional handheld cellular CPE while recharging – does not defeat CMRS status, nor is there any FCC precedent suggesting that such operation is “prima facie” evidence that a service is not CMRS. *Contra* Beacon at 2; *see also* JSI at 6-7.

7/ *See* Western Wireless at 12-15.

cellular service packages. Moreover, even if considered alone, BUS is a mobile service provided using CPE that is capable of being moved and ordinarily does move, and BUS moreover can be viewed as incidental, ancillary, and/or auxiliary to Western Wireless' conventional cellular service. 8/

Therefore, so long as the offering meets the statutory definition of CMRS, there is no relevance to the fact that a wireless service is competitive with wireline local exchange service, 9/ or that it uses CPE that substitutes for "last-mile" ILEC wires. 10/ And the fact that BUS customers may realize optimal cellular coverage when using the Telular CPE at home does not diminish the ability of BUS customers to receive cellular signals and use the CPE on the go. 11/

Inaccurate comparisons between BUS and basic exchange telephone radio service

8/ *Id.*

9/ *E.g.*, SDITC at 4-5; *see* Sections II and III *infra*.

10/ *Contra*, Nebraska Companies at 2; JSI at 5; *accord*, CTIA at 9.

11/ *Contra*, Nebraska Companies at 2; MIC at 3; Initial National Telephone Cooperative Association at 1-2 ("NTCA"). Beacon suggests that statements in Western Wireless Service Agreement for BUS regarding installation and use of BUS equipment at a customer's home defeat the offering's CMRS status. Beacon at 3 (citing Petition, Attachment B, Exhibit C at 2, 7). This suggestion is misplaced. Only the optional antenna, if desired to maximize signal strength, needs to be installed either by the customer or by a Western Wireless technician. The Telular unit itself can be used with or without such an antenna, and either at home, at another location, or in transit.

(“BETRS”) – which Western Wireless has already distinguished from BUS – likewise prove nothing. 12/

Significantly, the ILEC community is not unanimous in making these baseless arguments. Dobson, Sprint, and the Rural Telecommunications Group (a coalition of small rural ILECs with competitive local exchange carrier (“CLEC”) affiliates) – all rural ILECs and/or affiliates of those companies – join Western Wireless in showing that competitive universal service offerings of mobile wireless carriers fall within the Act’s definition of CMRS. 13/ These parties agree that BUS is sufficiently mobile and/or ancillary or incidental to Western Wireless’ cellular service to qualify as CMRS. As recognized by Dobson, the Commission has already concluded that mobile offerings, such as BUS, that “allow the end user to communicate while moving or from different locations,” can be distinguished from fixed service, which “requires the end user to be at a set location.” 14/ Dobson also

12/ Compare, e.g., NTCA at 1-3; JSI at 7-8; SDITC at 2, *with* Western Wireless at 19 (distinguishing BUS from BETRS).

13/ See Sprint at 1 (filed by Sprint Corporation “on behalf of its local, long distance, and wireless divisions”); Rural Telecommunications Group at 2 (“members are affiliated with rural, incumbent LECs” and “provide wireless telecommunications services”) (“RTG”); Dobson Cellular Systems, Inc. (“Dobson”).

14/ Dobson at 3, *citing Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965, 8969, ¶ 6 n.13 (1996); *see also* Western Wireless at 17-21 (explaining how BUS allows its customers to communicate while moving or from different locations rather than

correctly points out that a “wireless local loop” offering does not necessarily equate to a fixed service, as some of the ILEC representatives argue; rather, wireless local loop service may be mobile. 15/

II. PUBLIC POLICY REQUIRES THAT WESTERN WIRELESS BE REGULATED DIFFERENTLY FROM THE ILECS WHEN OFFERING BASIC UNIVERSAL SERVICE

The Commission should reject the arguments submitted by RUS and several of the ILECs that the Commission should grant the petition in order to ensure that BUS is regulated in precisely the same manner as ILECs’ wireline local exchange service offerings. 16/ These parties’ real source of discontent appears not to be that Western Wireless’ BUS is regulated as CMRS, but rather, that Section 332(c)(3) precludes state rate and entry regulation of CMRS universal service offerings. 17/ For example, JSI submits that “when a wireless service is directly

tying them to one set location); RTG at 4, 5 (noting that “Western Wireless’ BUS is a mixed service offering” and “is an incidental service classified as CMRS”).

15/ Dobson at 3.

16/ See, e.g., Rural Utilities Service (“RUS”); Rural Iowa Independent Telephone Association (“RIITA”); Warinner, Gesinger & Associates, LLC (“WGA”); Fred Williamson & Associates, Inc.

17/ BUS is not the only way to provide a CMRS-based universal service offering; a number of carriers have already been designated as ETCs for the provision of cellular service using conventional cell phones. *Cellco Partnership d/b/a Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-2895 (CCB rel. Dec. 26, 2000) (designating Verizon Wireless) (“*Cellco ETC Order*”); *Order # 6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone*

competing with a wireline service . . . policies governing wireless carriers . . . must be consistent with the policies governing all competing carriers.” 18/ These parties’ contentions that differential regulation of ILECs and CMRS providers creates a “split-level playing field” 19/ merely reflect dissatisfaction with Congress’ choice to exempt CMRS providers from state rate and entry regulation, even when they compete with LECs in providing basic local telecommunications. 20/ But this policy disagreement with the law of the land provides absolutely no basis for the Commission to misclassify BUS as non-CMRS.

CTIA correctly shows that “the legislative history and the Commission’s nearly contemporaneous orders make clear [that] both Congress and the Commission understood that wireless carriers using federally granted CMRS

Company Wire Centers for Federal Universal Service Support, Docket No. 99-GCC2-156-ETC, 2-4 (Kansas Corporation Commission Jan. 19, 2000) (designating Sprint PCS); *Yelm Telephone Company, et al.*, Docket Nos. UT-97033 through 97056 (Washington Utilities and Transportation Commission Dec. 23, 1997) (designating U.S. Cellular Corp.).

18/ JSI at 2; *see also* OPASTCO at 3 (“OPASTCO has long maintained that the precise technology . . . used by the local loop, whether wireless or wireline, is incidental for regulatory purposes”).

19/ RUS at 2; WGA at 1.

20/ Instead, Western Wireless urges these parties to concentrate their efforts on opening rural markets to competition, which, as Western Wireless has proven where it has launched BUS, will result in significant consumer benefits. The ILEC petitioners in this proceeding and their supporters, however, have not taken this approach, but instead seek to maintain their monopoly position in the local market and impose ILEC-type regulation on a competitive service offering. *Cf.* RTG at 7-8.

licenses could, and hopefully would, offer ‘basic telephone service’ in competition with traditional LECs.” 21/ Congress, in enacting Section 332(c)(3) in 1993, stated that it intended not to permit states to impose rate and entry regulation on CMRS offerings that use radio to provide basic telephone service. 22/ While Congress provided a vehicle for lifting that exemption, the standards for lifting the exemption clearly have not been satisfied in this case. 23/ Moreover, in the 1996 Act, Congress specifically “recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs.” 24/ The Commission found this exemption to be appropriate, and retained the different

21/ Cellular Telecommunications & Internet Association at 8 (“CTIA”).

22/ *Id.* at 7, citing H.R. Conf. Rep. No. 103-213 at 493, reprinted in 1993 U.S.C.C.A.N. 1088, 1182. *Accord*, Sprint at 9-11; Western Wireless at 25-26, citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 4452-45, ¶¶ 96-97, 102 (1994) (“regulatory parity” does not require regulation of parties without market power in the same way as parties with market power).

23/ See 47 U.S.C. § 332(c)(3)(A); see *infra* Section III.

24/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15995-96, ¶ 1004 (1996) (construing 47 U.S.C. § 3(26)), *aff’d in pertinent part sub nom. Iowa Utils. Bd. v. FCC*, 124 F.3d 753 (8th Cir. 1997).

forms of interconnection regulation that Congress adopted for ILECs and CMRS providers offering similar services. 25/

Moreover, the fundamental principle of “competitive neutrality” most assuredly does not require the Commission to subject Western Wireless’ BUS offering to the same state regulatory regime as the rural ILECs’ offerings, nor does this argument justify misclassifying BUS as not CMRS. 26/ In the same *Universal Service Order* in which the Commission adopted the “competitive neutrality” principle, the Commission also specifically rejected the ILECs’ argument for subjecting competitive providers of universal service to the same regulatory treatment as ILEC universal service offerings. 27/ To the contrary, the FCC found that “the Joint Board correctly concluded that the imposition of additional eligibility

25/ *Id.*; see also *id.*, 11 FCC Rcd at 16000, ¶ 1014 (recognizing that some CMRS carriers provide telephone exchange service or exchange access).

26/ OPASTCO at 4-5; JSI at 2-4; RUS at 3; FWA at 4-6 Beacon at 4-5; OPASTCO at 3-4; FWA at 6-7; RIITA at 4.

27/ *Federal-State Joint Board on Universal Service*, First Report and Order, 12 FCC Rcd 8776, 8801, ¶ 47 (1997) (adopting “competitive neutrality” principle) (“*Universal Service First Report and Order*”); *id.* at 8855-58, ¶¶ 142-44 (rejecting argument for imposing ILEC regulation on competitive ETCs). While the Fifth Circuit reversed the FCC’s decision that *states* were precluded from adopting additional eligibility criteria, it did not address the basic policy decision that such additional criteria were unnecessary and in some cases could thwart competition. *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 2212 (2000), *cert. dismissed*, 121 S.Ct. 423 (2000).

criteria would ‘chill competitive entry into high cost areas.’ ” 28/ The Commission found that, to the extent such requirements would preclude some carriers from being designated as ETCs, they would *violate* competitive neutrality. 29/ The Commission also specifically held that states could not decline to designate wireless carriers as ETCs on the basis that they are exempt from state rate and entry regulation under Section 332(c). 30/

Furthermore, as a general matter, “[d]isparate regulatory treatment applied to monopolist firms vis-à-vis competitive firms is fully justified, as necessary to protect the public interest.” 31/ This proposition is supported by a consistent line of decisions of Congress and federal and state regulators. Congress

28/ *Universal Service First Report and Order*, 12 FCC Rcd at 8858, ¶ 144.

29/ *Id.*

30/ *Id.* at 8858-59, ¶ 145 (“The treatment granted to certain wireless carriers under section 332(c)(3)(A) does not allow states to deny wireless carriers eligible status.”); *id.* at 8859, ¶ 147 (“Nothing in section 214(e)(1) [] requires that a carrier be subject to the jurisdiction of a state commission in order to be designated an eligible telecommunications carrier [so] CMRS providers, and other carriers not subject to the full panoply of state regulation may still be designated as eligible telecommunications carriers.”); *see also Federal-State Joint Board on Universal Service*, Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078, 8113, ¶ 72 (1999) (“We re-emphasize that the limitation on a state’s ability to regulate rates and entry by wireless service carriers under section 332(c)(3) does not allow the states to deny wireless carriers ETC status.”); *Cellco ETC Order* (granting ETC status for universal service offering provided via traditional cell phones).

31/ CTIA at 4-5.

saw the wisdom of treating differently situated carriers differently in 1993, when it decided to regulate CMRS carriers differently from state-regulated wireline providers of local telecommunications service. 32/ Similarly, in 1996, Congress properly decided to subject ILECs to more rigorous interconnection obligations than CLECs, even though both classes of carriers offer similar services. 33/

Consistently, the Commission has long found it appropriate to regulate incumbents more stringently than new entrants. 34/ State legislatures and commissions have done the same. 35/ The principle is clear: rate, entry, and other

32/ See discussion of 47 U.S.C. § 332(c)(3), *supra* at 7-8.

33/ Compare 47 U.S.C. § 251(c) (ILEC requirements) with § 251(b) (CLEC requirements) and § 251(a) (requirements of other carriers).

34/ See, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1 (1980) (eliminating rate and entry regulation for new entrants, and distinguishing them from incumbents on the basis of lack of market power) (subsequent history omitted); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730 (1996), *aff'd sub nom. MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (eliminating tariff requirements for non-dominant interexchange carriers); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756, 15858-59, ¶ 179 (1997) (“[S]eparation requirements should be imposed only on incumbent independent LECs that control local exchange and exchange access facilities. We believe this conclusion is consistent with the 1996 Act, which provides different regulatory treatment for incumbent and non-incumbent LECs. . . . By limiting application of the separation requirements to incumbent independent LECs that control local exchange and exchange access facilities, we avoid imposing unnecessary regulation on new entrants in the local exchange market . . .”).

35/ See, e.g., KCC at 2-3 (describing different treatment of ILECs and other providers of local telecommunications service under Kansas law).

forms of regulation may be necessary to prevent incumbent carriers from abusing their market power, but there is no public policy basis for imposing such regulations upon new entrants who lack market power. As shown in Western Wireless' initial Opposition, denying the Petition would advance the Commission's commitment to promoting competitive entry into universal service markets by mobile wireless carriers. 36/

III. THE KANSAS CORPORATION COMMISSION'S COMMENTS MAKE IT CLEAR THAT THE RELIEF SOUGHT IN THE PETITION IS NOT WARRANTED

The Comments of the Kansas Corporation Commission ("KCC") demonstrate that ILEC calls to deprive Western Wireless' BUS of its CMRS status are based on misunderstandings of Kansas law, and would be fruitless and superfluous in any event. Several ILECs argue that BUS should be denied CMRS treatment, ostensibly so that all universal service providers will be subject to the same regulatory treatment. 37/ The KCC makes it clear, though, that even if BUS were deemed not to be CMRS, it still would not be regulated the same as ILEC universal service offerings. 38/ The KCC also makes clear its belief that it has

36/ Western Wireless at 26-27.

37/ OPASTCO at 3-5; RIITA at 4-5; Beacon at 4-5; FWA at 4-7; Nebraska Companies at 4 n.7.

38/ See KCC at 2-3 (noting that requirements imposed on ILECs regarding data transmission speed do not apply to competitive carriers – whether wireline or wireless – and Kansas law regulates new entrants less stringently than ILECs).

ample regulatory authority over Western Wireless, even if BUS is accorded CMRS treatment. ^{39/} Thus, despite the supporting commenters' claims, there is no basis for, or benefit from, depriving BUS of CMRS treatment in hopes of achieving "regulatory parity."

Moreover, while Section 332(c)(3)(A) of the Act allows state commissions to seek rate and entry authority over a CMRS provider, no state has sought such authority in this case. To the contrary, the KCC specifically notes that it believes that "Western Wireless' BUS offering does not appear, at this time, to constitute 'a substantial portion of the communications within the state.'" ^{40/} And the mere fact that Western Wireless' offering may be substituted for ILECs' service is not sufficient to trigger Section 332(c)(3)(A). Rather, a successful petition under that provision must demonstrate that "market conditions . . . fail to protect

Thus, RUS's concern about preserving state authority to require ETCs' to offer higher data speeds, RUS at 3, is irrelevant given that Western Wireless' BUS would not be bound by Kansas rules regarding data transmission speed regardless of whether or not it is exempt from Kansas rate and entry regulation as CMRS.

^{39/} KCC at 3. *See also General Investigation Into Quality of Service Standards to Determine Whether a Uniform Set of Standards Can be Applied to All ETCs*, Docket No. 00-GIMT-584-GIT, Order 3, at 10, ¶ 26, 13 ¶ 32 (KCC rel. May 5, 2000) (available at <http://www.kcc.state.ks.us/scan/200005/20000504112944.pdf>) ("KCC Standards Order"). *Cf.* Western Wireless at 24 & n.53 (similar decisions of other state commissions).

^{40/} KCC at 4; *contra*, SDITC at 3; JSI at 2.

subscribers adequately from unjust and unreasonable rates . . .” 41/ – in other words, that the CMRS provider has “displaced the local wireline carrier as the dominant provider of telecommunications service.” 42/ Obviously, that showing is contradicted by all the facts here and cannot be met.

41/ 47 U.S.C. § 332(c)(3)(A)(i).

42/ CTIA at 7.

IV. CONCLUSION

For the foregoing reasons, and those presented in its initial Opposition, Western Wireless respectfully submits that the Commission should deny the Petition and retain the existing treatment of Western Wireless' Basic Universal Service offering as CMRS.

Respectfully submitted,

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January 8, 2001

CERTIFICATE OF SERVICE

I, Cecelia Burnett, hereby certify that on this 8th day of January, 2001, the foregoing "Reply Comments of Western Wireless" was served on the following by hand delivery or by first class mail.



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